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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972
No. 72-302

PICTURE MUSIC, INC.,

Petitioner,

vs.

BOURNE, INC.,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

Respondent's Statement of the Case Incorrectly States Petitioner's Position.

Respondent's brief states:

> "Petitioner contends that the [employment for hire] doctrine should not apply to independent contractors, but only to regular employees with fixed hours and wage." (Resp. Br. p. 4).

This is an incorrect characterization of Petitioner's position, as stated in our petition. We do not take the position that only employees who work "with fixed hours and wage" are subject to the "for hire" doctrine. One may be an "employee" and hence subject to the "for hire" doctrine even if neither hours nor wages are rigidly fixed. The "essential element" necessary to the establishment of an employer-employee relationship (and hence to the applicability of the "for hire" doctrine) is the right of the employer to "direct and super-

vise the manner in which the writer performs his work." *Donaldson Pub. Co. v. Bregman, Vocco & Conn. Inc.*, 375 F.2d 639, 643 (2d Cir. 1967). See Petition, p. 6. It is undisputed that there was no such right to direct or supervise the work of Miss Ronell in the instant case.

The remainder of Respondent's Statement of the Case contains statements some of which are misleading, and virtually all of which are irrelevant in the present posture of the case. The fact that Miss Ronell received royalties for the use of her song during the original term of copyright does not bear upon her right to claim the renewal copyright. Nor is it unusual for an author to be paid royalties during the original term, and then to be entitled to the copyright itself for the renewal term. If it were relevant, Petitioner would quarrel with the suggestion that Miss Ronell's contribution to the completed song "Who's Afraid of the Big Bad Wolf" was minimal. The record reflects a substantial contribution both quantitatively and qualitatively. But this is irrelevant for present purposes because the Court of Appeals below chose not to base its decision upon the District Court's appraisal of the quantum of Miss Ronell's contribution. The decision was based instead purely on the conclusion of law that an independent contractor renders services in a "for hire" relationship within the meaning of Sec. 24 of the Copyright Act. It is the error in this conclusion which Petitioner here asserts, and which is central to the Petition for Certiorari.

II.

Respondent Misses the Point Made by Petitioner With Respect to Fisher v. Witmark.

Respondent points out that the sole question decided by this Court in *Fred Fisher Music Co., Inc. v. M. Witmark & Sons,* 318 U.S. 643, 87 L.ed. 1055 (1943) was as to "whether . . . an agreement to assign his renewal, made by an author in advance of the twenty-eighth year of the original term of the copyright, is valid and enforceable." From this Respondent argues that since this Court in *Fisher* "did not deal with the subject of the instant case, . . . Petitioner's claim is groundless." (Resp. Br. p. 10). This misses the thrust of Petitioner's argument with respect to the *Fisher* case. Petitioner's point is that if the "for hire" clause of Sec. 24 of the Copyright Act applied to independent contractors, then the question posed and decided in *Fisher* would never have arisen since the author in that case, as an independent contractor, would have been deprived of his renewal rights with or without such "an agreement to assign his renewal". The fact that this Court accepted the aforesaid question as dispositive of the case is at least some indication that this Court's view as to the status of independent contractors under the Copyright Act is inconsistent with the view adopted in the Court of Appeals below in the instant case.

III.

Petitioner's and Not Respondent's Characterization of Brattleboro Pub. Co. v. Winmill Pub. Corp. Is Accurate.

The Court of Appeals in the instant case cited *Brattleboro Pub. Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966) as holding "that advertisements designed and printed by a newspaper, obviously at the 'instance' of the advertiser, were done for hire." (457 F.2d at p. 1216). Petitioner pointed out that *Brattleboro* did not so hold, and Respondent now characterizes Petitioner's position as an "inexcusable distortion" (Resp. Br. p. 11). Yet, the very passage from *Brattleboro* which Respondent quotes (Resp. Br. pp. 11-12) supports Petitioner's position. In that passage the *Brattleboro* court first discusses the traditional "works for hire" doctrine. It then concludes: "We see no sound reason why these *same principles* are not applicable when the parties bear the relationship of employer and independent contractor." (Emphasis added.) These "same principles" plainly refer to the presumption that the copyright in the first instance resides not in the author creating the work, but rather in the person for whom the work was done. The *Brattleboro* court does not hold that an independent contractor relationship *is* a "work for hire", but only that the same principles applicable to a work for hire should be applicable to an independent contractor. This significant distinction is reflected not only in the language employed in *Brattleboro*, but also in the fact that immediately following the passage from *Brattleboro* quoted in Respondent's brief, the *Brattleboro* opinion supports its position by quoting from Sec. 63 of *Nimmer on Copyright* which deals with the rights of independent

contractors, which section notes both similarities and differences between the rights of independent contractor-authors and employee-authors. That Section points out that like employee-authors, independent contractor-authors are presumed to transfer their copyright for the initial term, but that unlike employee-authors, independent contractor-authors do not thereby lose their renewal rights. *Brattleboro* itself, of course, was concerned only with rights during the initial term of copyright, and had no occasion to expressly discuss renewal rights. Therefore, when *Brattleboro* concludes that the "same principles" are applicable, it is only holding that during the original term of copyright independent contracts may be treated *as if* they were employees. It does not hold (as does the Court of Appeals below) that independent contractors *are* employees, with all that that implies for renewal purposes.

IV.

Respondent Misreads the Crucial Passage in Yardley v. Houghton.

Petitioner pointed out that in *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939) the court recognized that the author's executor was entitled to claim renewal, and that this is inconsistent with the view that independent contractors are to be treated like employees for renewal purposes, since an employer or his assignee, and not the employee's executor is entitled to claim renewal. Respondent argues that the passage in *Yardley* which recognizes the renewal right to reside in the author's executor was merely a recognition that the author or his executor held the copyright in trust for the commissioning party. The *Yardley* court did recognize the possibility of such a trust relationship for the original term of copyright. Respondent is clearly

wrong, however, in concluding that the *Yardley* court also recognized such a trust relationship for the renewal term. To the contrary, the *Yardley* court not only did not rule as to the renewal term, but after stating "that only Turner's executor could legally obtain a renewal", immediately cited as authority for this statement the case of *Fox Film Corp. v. Knowles*, 261 U.S. 326, 67 L.ed. 680 (1923). This is a case which recognizes the right of the executor of an author to claim on behalf of the author's estate renewal copyright under the second proviso clause of Sec. 24 of the Copyright Act. The *Fox Film* case did not turn upon nor apply the "for hire" clause, contained in the first proviso clause of Sec. 24. Thus, *Yardley*, in citing *Fox Film*, was clearly stating that Turner's executor was entitled to claim renewal under the second proviso claims of Sec. 24, and not as a trustee on behalf of an employer.

V.

Respondent's Attempt to Distinguish Shapiro, Bernstein & Co. v. Jerry Vogel Music Co. Displays a Misunderstanding of Copyright Law.

Respondent argues that since the author in *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir. 1955) purported to sell only the copyright for the original term, this serves to explain why the author retained his copyright for the renewal term, and that this case, therefore, does not support Petitioner's position. Respondent is apparently unaware that no express grant of a renewal term is required if the author works in a "for hire" relationship. The employer in such circumstances becomes owner of the renewal copyright by operation of law without such a grant. See *e.g. Rytvoc, Inc. Robbins Music Corp.*, 289 F.Supp. 136

(S.D.N.Y. 1967). It is only where the "for hire" clause is *not* applicable that absent such a grant, the author retains his renewal rights. Therefore, the passage quoted at page 14 of Respondent's brief only serves to emphasize that the court did not regard the "for hire" clause as applicable to the author in that case.

VI.

Respondent Has Failed to Address Itself to the Policy Considerations Underlying the Renewal Provisions of the Copyright Act.

Petitioner explored at some length the rationale of the renewal provisions of the Copyright Act (Petition, pp. 5-8). We further argued that the importance of these policy considerations to the members of the nation's intellectual and artistic community renders a decision by this Court particularly important (Petition, pp. 13-14). Yet, Respondent in its brief has completely ignored this crucial aspect of the case. Petitioner here reasserts not only the technical grounds argued above, but also, as particularly appropriate for consideration by this Court, the vital underlying needs of writers and artists, whose well-being is so crucial to the nation.

Conclusion.

For the foregoing reasons, Petitioner reaffirms its prayer that writ of certiorari be granted.

Respectfully submitted,

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